IN THE

Supreme Court of the United States

October Term 1965

No. 239

UNITED SPECIALTY ADVERTISING COMPANY and UNITED SPECIALTY PRODUCTION COMPANY,

Petitioners,

vs.

FURR'S, INC., REX WEBSTER, LEON E. HARRIS and HOWARD WELBORN, individually and dba WEBSTER, HARRIS & WELBORN ADVERTISING AGENCY,

Respondents.

Petition for a Writ of Certiorari to the Texas Court of Civil Appeals at El Paso, Texas.

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SUBJECT INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Statutes and constitutional provisions involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	14

INDEX TO APPENDICES

Appendix A. Opinion, dated Nov. 25, 1965	1
Appendix B. Opinion, dated Oct. 5, 1960	9
Appendix C. Constitutional Provisions	17
Statutory Provisions	17
Appendix D. Motion for Rehearing	19
Appendix E. Application for Writ of Error	27
Appendix F. Motion for Rehearing of Application for Writ of Error	29

TABLE OF AUTHORITIES CITED

Cases	Page
Angelena County Lumber Co. v. McNight, 265 S.W. 2d 246	11
Barrows v. Jackson, 346 U.S. 249, rehear. den. 346 U.S. 841	7
Brown v. City Service Co., 245 S.W. 656	13
Dale Truck Line, Inc. v. R & M Well Servicing & Drilling Co., 325 S.W. 2d 848	10
Dallas General Drivers v. Vilbig Bros., 225 S.W. 2d 617	10
Dimick v. Schiedt, 293 U.S. 474	8
Houston Belt and T. Ry. Co. v. Texas and New Orleans R. Co., 289 S.W. 2d 217	10
James v. E. Weinstein & Sons, 12 S.W. 2d 959	10
Mieres v. Bruse, 153 Tex. 511, 271 S.W. 2d 419	10
New York Times v. Sullivan, 376 U.S. 254, mot. den. 376 U.S. 917	11
Norris v. Alabama, 294 U.S. 587	13
Patterson v. Alabama, 294 U.S. 600	12
Rogers v. City of Fort Worth, 275 S.W. 214	13
Ross v. McLelland, 281 S.W. 2d 733	10
Safeway Stores, Inc. v. Webb, 164 S.W. 2d 868	13
Shelley v. Kraemer, 334 U.S. 1	7
Slocum v. New York Life Insurance Company, 228 U.S. 364	13
Transport Company of Texas v. Robertson Transports, 152 Tex. 551, 261 S.W. 2d 549	10
Truax v. Corrigan, 257 U.S. 312	12
Washington v. Superior Court, 289 U.S. 361	11

Constitutional Provisions Page

Texas Constitution, Art. I, Sec. 15 .....2, 7, 8
United States Constitution, Fourteenth Amendment 2, 7, 12

Statutes

United States Code, Title 28, 1257(3); 62 Stat. 929 .. 2
Vernon's Texas Civil Statutes, Art. 2123 .....2, 7, 8
Vernon's Texas Civil Statutes, Art. 4642 .....2, 7, 8

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Respondents.

Petition for a Writ of Certiorari to the Texas Court of Civil Appeals at El Paso, Texas.

Petitioners pray that a writ of certiorari issue to review the judgment of the Texas Court of Civil Appeals at El Paso, entered in the above entitled case on November 25, 1964.

Citations to Opinions Below.

The opinion of the Texas Court of Civil Appeals filed on November 25, 1964 is reported at 385 SW 2d 456. A prior opinion of the same court in an earlier proceeding of the case is reported at 338 S.W. 2d 762. Said opinions are respectively set forth in full in Appendices A and B attached hereto. Application for writ of error to the Supreme Court of Texas was re-

fused on March 17, 1965; Petition for Rehearing to the Supreme Court of Texas was denied on April 21, 1965. No opinions were rendered by the Supreme Court of Texas.

Jurisdiction.

The Court of Civil Appeals of the State of Texas, at El Paso, entered judgment against petitioners on November 25, 1964. Petitioners moved for a rehearing in said court which was denied on December 30, 1964. Petitioners' application for writ of error to Supreme Court of Texas was refused March 17, 1965. Petitioners' application for rehearing was denied in the Supreme Court of Texas on April 21, 1965. The judgment of the Court of Civil Appeals became final on April 21, 1965. Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(3).

Question Presented.

Does the denial of a jury trial in a common law action because of an unsuccessful attempt to secure a temporary injunction at an earlier stage in the proceedings deprive a litigant of equal protection of the laws?

Statutes and Constitutional Provisions Involved.

The constitutional provisions involved are the 14th Amendment to the Constitution of the United States, Article I Section 15 of the Constitution of the State of Texas. The statutory provisions involved are Article 2123 of Vernon's Texas Civil Statutes and Article 4642 of Vernon's Texas Civil Statutes. These constitutional and statutory provisions are set forth in Appendix C attached hereto.

Statement.

Petitioners through years of effort and expenditure of money had developed an advertising specialty device known as the "Cash Bonus Card." They engaged in the business of selling the Cash Bonus Card advertising system to various retail supermarkets, and supplying the necessary materials and information to allow said supermarkets to effectively operate this system. Petitioners had explained this system to respondent Furr's, Inc. who purchased the idea and the materials for use in some of its retail stores. Thereafter Furr's, Inc. began using the system in its other retail stores without compensation to petitioners. In their original and first amended petition, petitioners sued only Furr's, Inc., alleging theft of a trade secret and praying for a temporary and permanent injunction and damages. The temporary injunction was obtained from the trial court; however, this was dissolved by the Court of Civil Appeals in a decision entitled *Furr's Inc. v. United Specialty Advertising Company,* 338 S.W. 2d 762, writ of error refused, n.r.e. (See Appendix B). Thereupon petitioners amended their pleadings and joined new party defendants, respondents Rex Webster, Leon E. Harris and Howard Welborn doing business as Webster, Harris & Welborn Advertising Agency. New causes of action for recovery of damages as well as injunction were added so that the case went to trial on the following pleaded theories.

(1) Theft of trade secrets [Pars. 14, 18, 22, Second Amended Original Petition, Tr. 9-11, 13-14, 16];

(2) Breach of a confidential relationship [Par. 14, Second Amended Original Petition, Tr. 9-11];

(3) Unlawful conspiracy [Pars. 8, 9, 10, 11, 12 and 18, Second Amended Original Petition, Tr. 7-9, 13-14]; and

(4) Unfair competition [Pars. 12, 21, Second Amended Original Petition, Tr. 9, 14].

Each of these separate and independent claims and causes of action was developed and tried exhaustively in the trial court for almost two weeks [Judgment, Tr. 94-104]. Each of such theories or causes was separately submitted in special issues to the jury [Tr. 64-74]. The jury deliberated almost eight hours before returning the verdict in favor of petitioners, which established each of said causes of action and each of the supporting ultimate facts then asserted by petitioners, to wit:

(1) The respondents, Webster, Harris & Welborn Advertising Agency as well as Furr's, appropriated petitioners' "trade secrets": Special Issue No. 5, petitioners' "Bonus Card" advertising program and system was not a simple and obvious device, revealed by the card alone; No. 6, respondents' card advertising program was substantially the same as petitioners' program; No. 7 petitioners' advertising program consisted of a device used by them in their business; No. 8, such device gave to petitioners a business advantage over competitors who did not know it or use it; No. 9, such device was developed by petitioners for continuous use in the operation of their business; No. 10, the details of this device were unknown to respondents until disclosed to them by petitioners; and No. 20, petitioners by the distribution of their cards did not make known to the general public the details of the advertising program and device [Tr. 67-69, 73].

(2) Respondents were guilty of breaching a confidential relationship: Special Issue No. 1, petitioners' sales manager disclosed the advertising program to Furr's for the purpose of enabling it to appraise its value; No. 2, details of petitioners' advertising program were disclosed to Furr's as a part of the negotiations leading up to the execution of the contract for the use of the program by Furr's; No. 3, Furr's obtained this knowledge of the details of petitioners' advertising program and system through dealing with petitioners and their sales manager; and No. 4, there existed between petitioner and Furr's a relationship of trust and confidence at the time of the transactions had between them in which Furr's obtained its knowledge of the advertising program and system [Tr. 66].

(3) Respondents joined in an unlawful conspiracy to injure petitioners' business: Special Issue No. 15, respondents Furr's and Rex Webster joined together in an agreement to develop and use an advertising program substantially the same as petitioners' program; No. 16, such agreement was made by respondents with the intention (a) to operate their own program for their own profit and (b) to the injury or damage of petitioners' business; and No. 17, such agreement was the proximate cause of the injury and damage to petitioners' business [Tr. 70-71].

(4) Respondents were guilty of unfair competition: Special Issue No. 11, petitioners' advertising program was developed by them on the basis of information obtained, compiled and put in form for a specific use by them; No. 12, such development of said program was the product of petitioners' expenditure of labor, skill and money; No. 13, respondents appropriated to them-

selves petitioners' said program; No. 14, such program so appropriated by respondents was used by them in competition with petitioners' advertising operations to the profit of respondents [Tr. 69-70].

The Jury returned the verdict in favor of petitioners and against respondents and assessed damages in the amount of $60,000.

Thereupon respondents appealed to the Court of Civil Appeals at El Paso, which Court set aside the verdict of the jury and ordered that judgment be entered in favor of respondents and against petitioners. Said opinion is reported at 385 S.W. 2d 456. (See Appendix A). The basis of the Court of Civil Appeals' decision was that the petitioners, having unsuccessfully attempted to secure a temporary injunction, were bound by the first appellate decision in the case, and thereafter were not entitled to a jury verdict which differed from that first appellate ruling. The Court of Civil Appeals purported to examine the evidence in the case in an *obiter dictum,* substituted itself as the trier of facts for the jury, and found there was no evidence to support the verdict.

Petitioners raised the federal question of the denial of their right to a jury trial effected by the wrongful setting aside of the jury verdict in a motion for rehearing to the Court of Civil Appeals. The issue was raised in all assignments of error but particularly in assignments of error 1, 2, 3, 6, 7, 8, 9, 14, 18, 19, 20, 21 and 22. See Appendix D attached hereto.

Petitioners raised the federal question of denial of their right to jury trial in their Application for Writ of Error to the Supreme Court of Texas. The issue of

denial of jury trial was again raised in all points of error and particularly in points I and II. See Appendix E attached hereto. On petitioner's Motion for Rehearing of Application for Writ of Error to the Supreme Court of Texas, the issue was particularly raised in Points I, II and III. See Appendix F attached hereto.

Reasons for Granting the Writ.

Petitioners were denied the equal protection of the laws of the State of Texas because they were deprived of the right to a trial by jury as guaranteed by Article I, Section 15 of the State Constitution, and Article 2123 of Vernon's Texas Civil Statutes. This deprivation occurred because the Texas Court of Civil Appeals ruled that as a condition to petitioners' applying for a temporary injunction under Article 4642 of the Texas statutes, they waived their right to a jury determination of respondent's liability for damages in the event the application for temporary injunction was refused. The Court of Civil Appeals overturned a jury verdict based upon a full trial on the merits on the grounds that the appellate court's reversal of an order allowing a temporary injunction, which reversal was based on a preliminary hearing, was *res judicata* and law of the case barring any recovery of damages by petitioners. As a purported alternate ground of decision the appellate court substituted itself as the fact finding body in place of the jury.

The denial of equal protection of the laws by the judicial branch of the state government is just as violative of the Fourteenth Amendment as if the wrong were done by the executive or legislative branch. *Shelley v. Kraemer,* 334 U.S. 1, *Barrows v. Jackson,* 346 U.S. 249, rehearing denied 346 U.S. 841.

The concern of the Supreme Court for the right of jury trial on civil cases is evidenced by the decision of the *Dimick v. Schiedt,* 293 U.S. 474, where the Court said (at page 486):

> "Maintenance of a jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Article I, Section 15 of the Texas Constitution states:

> "The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and efficiency. . . ."

This constitutional provision is repeated in Article 2123 of the Texas code. The statute which provided for the injunctive remedy of injunction in this case is Article 4642 of Vernon's Texas Civil Statutes which states:

> "Judges of the district and county courts shall in term time or vacation hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:
>
> (1) Where the applicant is entitled to the relief demanded and such relief or any part thereof require the restraint or some act prejudicial to him . . ."
>
> * * *
>
> (3) Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statute of this State relating to the granting of injunctions. . . ."
>
> * * *

Nowhere in the Texas statutes or Constitution is it provided that an adverse ruling on an application for a temporary injunction bars the petitioner from a jury trial on the issue of liability and damages nor from the benefit of a jury verdict after a full trial on the merits.

The Court of Civil Appeals said:

> "We first take up appellants' contention that this court's prior decision on the temporary injunction phase of the case determined, as the law of the case, that no trade secret existed and no confidential relationship existed between the parties. We feel that those issues were so distinctly put into issue and so fully developed and brought forward on appeal as to make their determination final as to the parties here involved and their privies." (385 S.W. 2d 458.)

The Court of Civil Appeals continued:

> "Appellees seek to avoid this holding by urging that they have now obtained jury findings as to ultimate facts, and that an additional party defendant has been added. We do not think that this has any particular bearing on the res judicata question, because the evidence and established facts being the same, what matter if found by the court or jury? On the issue of trade secret, the evidence is more voluminous, but its quality is unchanged. . . ." (385 S.W. 2d 459.)

The Court of Civil Appeals failed to distinguish between the case presented for the temporary injunction and the case which was ultimately tried before the jury.

Petitioners submit that the distinction which the Court of Civil Appeals refused to make is in reality vital to the case. The fact that additional evidence was introduced, new parties defendant joined, and new theories of recovery added, made the case basically and inherently different from that which the appellate court considered in reversing the order for temporary injunction. Texas authorities are clear that the appellate court cannot decide a case on the basis of the outcome of an application for preliminary injunction.

"It is well settled . . . that the rights of the parties on the merits will not be measured and determined by the appellate court on the basis of evidence introduced at a preliminary hearing." *Houston Belt and T. Ry. Co. v. Texas and New Orleans R. Co.,* 289 S.W. 2d 217, 220, citing the opinion of the Supreme Court of Texas in *Transport Company of Texas v. Robertson Transports,* 152 Tex. 551, 261 S.W. 2d 549.

An order after a preliminary injunction hearing can not divest a party of property rights without a trial. *James v. E. Weinstein & Sons,* 12 S.W. 2d 959. An order granting or refusing a temporary injunction cannot be made the basis of *res judicata* since it is only an interlocutory order. *Mieres v. Bruse,* 153 Tex. 511, 271 S.W. 2d 419; *Ross v. McLelland,* 281 S.W. 2d 733; *Dale Truck Line, Inc. v. R &M Well Servicing & Drilling Co.,* 325 S.W. 2d 848, err. ref. n.r.e., *Dallas General Drivers v. Vilbig Bros.,* 225 S.W 2d 617 err. ref.

The doctrine of law of the case cannot be applied where the pleadings and parties and evidence is differ-

ent. As stated in *Angelena County Lumber Co. v. McNight,* 265 S.W. 2d 246, 250 err. ref.:

> "Appellant has further contended that the opinion on the previous appeal of this case constitutes the law of the case and fixes as a matter of law the boundary line between appellant's and appellee's property. This contention is overruled. There is no showing that the second appeal does not involve different witnesses, different evidence, or even a different surveyor on behalf of the appellant."

The above cases establish that the Court of Civil Appeals was in error under Texas law in applying the doctrine of law of the case and *res judicata* to upset the jury verdict in this case. However, petitioners wish to stress that the question of whether the doctrine of law of the case was applied correctly under Texas law is not determinative of the case at bar. A state is not free to apply legal doctrines which deny citizens their federally protected constitutional rights. Such is the essence of the protection afforded by the Fourteenth Amendment. *If a state court's application of the common law denies a citizen its constitutional rights the Supreme Court will intervene to reverse the state court and set the limits of the application of the state common law. New York Times v. Sullivan,* 376 U.S. 254, motion den. 376 U.S. 917 (unconstitutional application of state law of libel.)

It is well established that a state may not require a foreign corporation to surrender any of its constitutional rights as a prerequisite to its qualifying to do business in the state. *Washington v. Superior Court,* 289 U.S. 361, and cases cited therein. Similarly, a state

court cannot require a litigant to give up its constitutional right to a jury trial in order to avail itself of the right to apply for injunctive relief. Such an action discriminates against litigants who would use provisional remedies before trial. The statute allows anyone to apply for a temporary injunction and does not make as a condition thereof the party's agreement to be bound by the result of the injunction petition. A state's arbitrary denial of equitable remedies which is injurious to a person's property rights is a violation of that persons's rights under the Fourteenth Amendment. *Truax v. Corrigan,* 257 U.S. 312. Forcing a litigant to give up its right to a jury trial on the issue of damages because it sought equitable relief places such a high price on the attempt to secure equitable relief that it is in effect a denial of one right or the other. Each litigant is entitled to the full range of the remedies provided by the law of the State of Texas on an equal basis with any other litigant. The fact that the Court of Civil Appeals effected the denial of petitioners' right to equal protection of the laws by use of the local doctrine of law of the case should not foreclose this Court's review. The Supreme Court will review the record to see if the asserted nonfederal ground is actually sufficient to deny the federal right which is claimed. *Patterson v. Alabama,* 294 U.S. 600.

The appellate court purported to give an alternative ground for its decision, stating that its review of the evidence influenced its decision. This act of substituting itself as the trier of fact and weigher of evidence was clearly a denial of a jury trial to petitioner. In its opinion the Court of Civil Appeals stated:

> "The evidence is more voluminous, but its quality is unchanged." (385 S.W. 2d 459)

The decision of the courts of Texas unequivocally establish that the action of the appellate court in substituting its evaluation of the evidence for that of the jury was a usurpation of authority. *Brown v. City Service Co.*, 245 S.W. 656; *Safeway Stores, Inc. v. Webb*, 164 S.W. 2d 868; *Rogers v. City of Fort Worth*, 275 S.W. 214. The latter case declared that such an act by a state appellate court is a violation not only of the litigant's rights under the state constitution but also under the *federal* constitution and cited with approval *Slocum v. New York Life Insurance Company*, 228 U.S. 364. The *Slocum* case cited many authorities establishing the wrongful nature of the act of the state appellate court.

The record in this case definitively shows that the decision of the appellate court that the evidence was insufficient to sustain the jury verdict was clearly erroneous. The appellate court cannot overturn the jury verdict if there is any evidence to support it. *Safeway Stores, Inc. v. Webb, supra.* Petitioners were denied equal protection of the laws of the State of Texas by the appellate court's wrongful action. This was a right which according to both the Constitution and the statutes of the State of Texas is to be "inviolate." In such a circumstance, it is the duty of the Supreme Court to examine the facts to vindicate petitioners' constitutional rights. As stated in *Norris v. Alabama*, 294 U.S. 587, 590:

> "[It] is our province to inquire not merely where it [the federal constitutional right] is denied in express terms but also whether it was denied in substance and effect. Otherwise review by this Court would fail of its purpose in safeguarding

> constitutional rights. Thus whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

Petitioners respectfully request this Honorable Court review the record in this case. The record will establish beyond doubt that there was ample evidence to support the jury verdict, and that the appellate court's reversal of that verdict was a deprivation of petitioners' right to equal protection of the laws of Texas, which guarantee each civil litigant a trial by jury.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Furr's, Inc., et al., Appellants v. United Specialty Advertising Company et al., Appellees, No. 5664, 385 S.W. 2d 456, 458. Court of Civil Appeals of Texas. El Paso. Nov. 25, 1964. Preslar, Justice.

This is a "trade secret" case which also involves unfair competition and conspiracy. After a trial by jury, appellees (as plaintiffs) recovered judgment against appellants Furr's and the Webster, Harris & Welborn Advertising Agency for damages in the amount of $60,000.00, and a permanent injunction by which the appellant-defendants were enjoined from making, using or distributing a system and device known as the "Cash Circle Card" program, or any other advertising program, scheme or device the same, or substantially the same, as plaintiffs' Bonus Card program or system. Plaintiffs obtained a temporary injunction which was reversed by this court in Furr's Inc. v. United Specialty Advertising Company, Tex. Civ. App., 338 S.W. 2d 762 (1960), writ of error refused, n.r.e., and reference is made to that case for greater details.

Appellants present some 48 assignments of error, grouped for convenience of argument. We do not feel it necessary to discuss each individually, as the disposition of some well make the consideration of others unnecessary. The case will be reversed and rendered.

We first take up appellants' contention that this court's prior decision on the temporary injunction phase of the case determined, as the law of the case, that no trade secret existed and no confidential relationship existed between the parties. We feel that those issues were so distinctly put into issue and so fully developed and

brought forward on appeal as to make their determination final as to the parties here involved and their privies. They were so tried and determined as to come within the rule followed by this court in Texaco Inc. v. Parker, Tex. Civ. App., 373 S.W. 2d 870 (err. ref., n.r.e.) which held that, even though in the strict sense, the decision on appeal from the granting or refusal of a temporary injunction may not be res judicata of the issues on final hearing, it may become the law of the case as to the legal principles declared. This is an exception to the general rule that an interlocutory judgment will not support a plea of res judicata, but it is a well-founded exception where the parties elect to distinctly put in issue a right or question of fact, as a ground of recovery or defense, and have it directly determined by the courts. It is supported by the authorities. Birchfield v. Bourland, Tex. Civ. App., 187 S.W. 422; International Longshoremen's Ass'n., Independent v. Galveston Mar. Ass'n., Tex. Civ. App., 358 S.W. 2d 607; Baker v. Hill, Tex.Civ.App., 35 S.W. 2d 779 (wr. dism.); Hayden v. City of Houston, Tex.Civ. App., 305 S.W. 2d 798 (wr.ref., n.r.e.); Hudspeth v. Guggenheim, Tex.Civ.App., 12 S.W. 2d 238 (wr. dism.) Its application depends in each case on what was done. Wilson v. Abilene Independent School Dist., Tex.Civ.App., 204 S.W. 2d 407 (err. ref., n.r.e.). In the case before us, the parties fully litigated the two issues in question. This is reflected by this court's prior opinion:

> "We believe that the issues that are here decisive are: Do the Cash Surprise Bonus Cards of appellees constitute a trade secret; and, if so, was such obtained unfairly by appellant by means of a breach of confidence?

The opinion then reviews the evidence and wealth of exhibits and the applicable law, and reaches the conclusion which was decisive of the appeal:

> "Therefore, because we do not believe there is a trade secret here involved, and because we do not believe that any information that appellant's advertising agency might have used was improperly obtained or obtained through breach of confidence, we must hold that there was not sufficient reason or justification to warrant the trial court in granting the injunction."

Appellees seek to avoid this holding by urging that they have now obtained jury findings as to ultimate facts, and that an additional party defendant has been added. We do not think that has any particular bearing on the res judicata question, because the evidence and established facts being the same, what matter if found by the court or the jury? On the issue of trade secret the evidence is more voluminous, but its quality is unchanged, and no contention is made that there have been any additional developments or changes in the factual set-up which brought about the suit. On the issue of confidential relations the evidence is unchanged. And the addition of a party privy, appellant Furr's advertising agent, has not brought about any change in the facts passed on, and it does not in any way alter the question or issues of trade secret and confidential relationship.

In addition to our holding that the law of the case has been established, we are of the further opinion that the facts of the present trial do not permit appellees to recover on the theory of what they call "theft of trade secrets", or any other theory of protection of trade

secrets, for the evidence on the present hearing fails to establish any confidential relationship existing between the parties for the breach of which an action would lie. Assuming a trade secret, the existence of some duty owed in connection therewith, and its breach, becomes our pertinent inquiry.

One who does not wish to make disclosure of his secret in return for the term protection of the patent laws, or otherwise protect it specifically by contract, can still be protected if his disclosure is made in confidence so as to place the other party under a duty to keep his secret. It is a well-settled rule that equity will grant relief when one breaches his confidential relationship in order to unfairly use a trade secret. Luccous v. J. C. Kinley Company, 376 S.W. 2d 336 (S. Ct. 1964); Hyde Corporation v. Huffines, 158 Tex. 566, 314 S.W. 2d 763; K & G Oil Tool & Service Co., v. G & G Fishing Tool Serv., 158 Tex. 594, 314 S.W. 2d 782. The owner of the secret must do something to protect himself. He will lose his secret by its disclosure unless it is done in some manner by which he creates a duty and places it on the other party not to further disclose or use it in violation of that duty. The rule of the American Law Institute Restatement of the Law, as set forth in Hyde v. Huffines, supra, by the Supreme Court, is:

> " 'One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other if (a) he discovers the secret by improper means, or (b) his disclosure or use *constitutes a breach of confidence reposed in him by the other in disclosing the secret to him* * * *.' 4 Restatement of Torts §757." (Emphasis ours).

Hyde v. Huffines granted protection to the owner of a trade secret who had granted another the right to manufacture his secret, which was done for some two years, under a written licensing agreement. The contract was silent as to the secret being kept confidential, but the court held that an express agreement was not necessary where the actions of the parties, the nature of their arrangement, the "whole picture" of their relationship established the existence of a confidential relationship. It was noted that they were, under the licensor-licensee arrangement, "co-adventurers". The facts of the case left no doubt that a confidential relationship existed and that all parties understood that it existed when disclosure was made. Hyde v. Huffines says no express agreement is necessary, but it stands to reason that the confidence reposed in the other person must, in some way, be manifest—if not by words, then by the acts of the parties or the whole picture of their relationship. Confidential relationship is a two-way street: if the disclosure is made in confidence, the "disclosee" should be aware of it. He must know that the secret is being revealed to him on the condition he is under a duty to so keep it. We belabored the point in this discussion because we do not believe that such was done in the case before us. We do not believe that the whole picture of the parties' dealings shows the existence of a confidential relationship. Further, if the owner of the secret intended that the disclosure be treated in confidence, such fact was not made known to the "disclosee", Furr's. There is no evidence to support the jury finding that there existed between the parties "a relation of trust and confidence at the time of the transactions had between them in 1959". Mrs. Hoese

who, with her husband, owns the appellee companies, testified that she had confidence in Furr's and relied on their integrity. This we can well accept as true, but the fact remains that she did not in some manner make it known to Furr's that her secret was being revealed to them in trust. And, she did not participate in the 1959 transactions. The only person Furr's had dealings with was the salesman, and he testified (and the jury so found) that he did not ask them to treat his statements as statements made in confidence. The record reflects a salesman working hard to make a sale —a sale with no strings attached, so far as confidence was concerned. There was nothing about the transactions and dealings of the parties which would establish a confidential relationship, nor put Furr's on notice that such was intended. It was an arm's length transaction which the jury found to be that of buyer-seller. Under such state of facts, we are of the opinion that such relationship as existed between the parties ended with the delivery of the materials purchased and the payment for them. That was in 1959, while this lawsuit is for breach of confidential relations alleged to exist in 1960. As stated, assuming a trade secret we are of the opinion that no confidential relationship existed between the parties; and absent such, appellees were not entitled to judgment for appropriation of a trade secret.

Appellees contend that there are other bases on which the judgment is supportable, but we are of the opinion that if we are correct in our determination that no confidential relationship exists between the parties, then the record does not substantiate any actionable wrongs. The judgment cannot be supported on the basis of un-

fair competition, for while unfair competition can be actionable where a confidence is violated or where there is a palming-off of one's goods for that of another, neither theory will stand here. The first we have already ruled out, and the palming-off theory is not in this case. Nor do we think that Gilmore v. Sammons, 269 S.W. 861, is applicable to the facts of this case. The wrong condemned in Gilmore v. Sammons was the conduct of Sammons in appropriating the news items of Gilmore and selling them in competition with Gilmore. Without going into the standing of that case in the light of more recent pronouncements, we simply note its inapplicability here, for there is no contention that Furr's ever sold or attempted to sell that which it is alleged to have appropriated, and we fail to see how it could make any difference that Furr's hired Webster to prepare the product for them. That brings us to another matter, that of substantiating the judgment on the theory of a conspiracy of Furr's and the Webster agency. "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." Bartlet v. Lehman, Tex.Civ.App., 207 S.W. 2d 131 (err. ref.); Kingsbery v. Phillips Petroleum Co., Tex.Civ.App., 315 S.W. 2d 561 (ref., n.r.e.). The necessary elements are not present in this case. It cannot be said that Furr's and Webster acted together in the use of the Cash Circle Card. Furr's hired Webster to produce the Cash Circle Card for them and paid him for it. After that, Furr's owned it outright and had sole control of its use. How they used it or whether they ever used it was not for Webster to say. It is the *use* of the card in 1960 which

is the cause of action alleged by appellees, as plaintiffs, and Webster was not acting with Furr's in such use.

The judgment of the trial court is reversed, the injunction dissolved, and judgment here rendered that appellees take nothing by their suit.

APPENDIX B.

Furr's Inc., Appellant, v. United Specialty Advertising Company and United Specialty Production Company, Appelleees. No. 5450. Court of Civil Appeals of Texas. El Paso. Aug. 3, 1960. Rehearing Denied Oct. 5, 1960. 338 S.W. 2d 762, Fraser, Justice.

This is an appeal from an injunction order emanating from the District Court of Midland County, Texas. The temporary injunction enjoined appellant from continuing the use of an advertising plan in its grocery stores, which plan was known as the "Cash Circle Card", with accompanying store banners and bag stuffers. This controversy arose in the following manner:

In May, 1959, a Mr. Goulding, sales representative for appellees, called on appellant at its home or general office, in Lubbock, Texas. Goulding made this appointment and call in an effort to persuade appellant to purchase the product of his employer, which was called the "Cash Surprise Bonus Card." Bag stuffers and banners were to be furnished along with the purchase. These bonus cards had been prepared and developed by appellees. They were oblong cards with various money amounts printed around the periphery of the card. These amounts were from ten cents up to five dollars, and were to be punched out by checker at the grocery store in accordance with the amount of the customer's purchase. When the card was fully punched out, the customer would receive $1 as a bonus, and then an opportunity to get a surprise bonus. There was a small black square sewed in the card which could only be removed by a store employee or official. If the customer could answer the simple question con-

tained therein, he might receive a bonus from one to one thousand dollars. Another feature of the card was that the customer could come in on Monday and get a free $2 punch, without having to purchase anything. There was no charge for these cards, and they were solely for the purpose of promoting sales in the grocery store. The card also contained a calendar device to keep track of the free punches, and the name of the store and some additional information or instruction. The appellant did not purchase any of these cards at the May meeting. In September of the same year, appellant called Goulding, or appellees, for another conference, at which time they purchased $10,000 worth of these cards, bag stuffers and banners. Shortly thereafter, they purchased another $2,200 worth. The record indicates that Goulding notified them that they could not buy cards for use in Midland or Odessa, as he had given the exclusive use of such cards in those two towns to a competitor of appellant, known as "Food Mart." Appellant bought the merchandise for use in a number of its other stores.

Shortly after this purchase, in September 1959, Food Mart began using the cards in the Midland, Odessa area. Appellant then asked an advertising agency in Lubbock to produce a promotion that would meet the competition of the use of appellees' cards by Food Mart in Midland and Odessa. A Mr. Webster, of the advertising agency, after some time produced the design involved here, and which was named "Cash Circle Cards". The Cash Circle Card involved the same method as appellees' card. It seems to differ only in that it is round, or circular; and, instead of punching out amounts of money, they are "branded". The arrange-

ment of the card is somewhat different, but it must be admitted that it is substantially the same, and has the sewed-in square for the surprise bonus, as does appellees' card.

Appellees brought suit for a considerable sum of money, and asked that appellant be restrained from using its Cash Circle Cards.

As stated in the briefs, this is a "trade secret" case, and does not involve copyright or patent problems. Appellees state in their brief that it does not involve a claim of unfair competition, as such is generally considered.

We believe that the issues that are here decisive are: Do the Cash Surprise Bonus Cards of appellees constitute a trade secret; and, if so, was such obtained unfairly by appellant by means of a breach of confidence?

There is some discussion of unfair competition, but we do not believe that principle applicable here, because the necessary elements, which we will not detail, are not in evidence.

We will take up, first, the question of whether or not the bonus cards of appellees were so constructed and developed as to constitute a "trade secret". After studying the record and the authorities, we have reached the conclusion that they were not. The idea of punch cards, or bonus cards, was not only old, but had been used in many forms and manners and cards similar to these were currently in use at the time of the sale, in many other cities and states, and had been advertised in the newspapers very extensively. The card speaks for itself. The newspaper advertisements, the bag stuffers and banners merely advertise and urge people

to take advantage of these cards, which were given out free. The cards themselves were self-explanatory on the face thereof. Appellant testified that it had used a somewhat similar device in 1950, whereby a customer, by virtue of his purchases, could buy cooking ware at a reduced price. Cards similar to these here involved were, and had been, in active use in grocery stores in Los Angeles, Chicago, Fort Worth, etc. There are other types of punch cards, or bonus cards, in the record as evidence, and examination of these, coupled with the testimony of witnesses, does not establish, in our opinion, anything about these cards that would constitute a trade secret. It is true that the cares were developed and improved over the years by the appellees, but they were exhibited to and used by the public, and had been explained and advertised to the public for many months before appellant purchased them. We do not believe that the sewed-in square creates sufficient distinction to make this particular card such as could be protected under the trade secret doctrine. As was said by the Supreme Court: "The subject matter of a trade secret must be secret." Wissman v. Boucher, 150 Tex. 326, 240 S.W. 2d 278, 280.

The court, in the above case, further says:

"* * * the exposure of the device to the public by advertisement or sale definitely operates to destroy any legal protection the claimed originator might otherwise assert on the basis of a trade secret * * * matters which are completely disclosed by the goods which one markets cannot be his secret." Again, these cards are completely explained by the language on the face thereof. It constitutes a complete disclosure of the method or scheme. The store in the cities named above had

informed the public, by newspaper advertising, banners and bag stuffers, of the entire method of this cash bonus card. In other words, the entire device, or method, had been exhibited to the general public for many months before appellant made its purchase. It seems to us to be a merchandising device, not especially new in design or method, and containing no particular secret. While the cards here involved are certainly similar, we believe it is only that similarity which would necessarily occur when anyone used the punch card bonus idea, which is by no means a new or secret idea. To hold otherwise, we think, would be to encourage and condone a monopoly and create the effects of a copyright where no copyright exists. It seems to us that these cards are not a secret, but more of a promotion of doing business or advertising. Certainly appellant could have, and apparently did have, all the information about these cards before it bought them, or before it asked its advertising agency to produce something in competition at Midland and Odessa. As stated in 79 C.J.S. 935: "While it has been said that an exact definition of a trade secret is not possible, the courts nevertheless define a trade secret to be a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it in order to apply it to the uses for which it is intended." This article later states: "Like any other secret, a trade secret is nothing more than a private matter; something known only to one or a few and kept from the general public, and not susceptible to general knowledge. There must exist a substantial element of secrecy, and the term 'trade secret' is not applied to matters of public knowledge, or of common knowledge to a trade, or of general

knowledge in an industry, or *to matters which are completely disclosed by the goods which are marketed.*" (Emphasis ours.) Here, of course, the cards were complete on their face, and were certainly offered and in use by the general public. We therefore hold that appellees' cards here involved, as constituted and sold, along with the bag stuffers and banners, do not come under the heading or meet the requirements of that which is a trade secret.

With regard to the second point, we do not believe that appellant acquires any information about these cards in the course of any confidential relationship between it and appellees, or appellees' representative. This was merely a case of a salesman attempting to make a sale, in May of 1959. He does not say that he asked them to keep this matter secret, but merely says that it was a confidential transaction because he had confidence in them. Appellees cite two cases which they consider extremely important; to-wit, Hyde Corporation v. Huffines, 158 Tex. 566, 314 S.W. 2d 763, and K & G Oil Tool & Service Co. v. G & G Fishing Tool Service et al, 158 Tex. 594, 314 S.W. 2d 782. In these cases, however, the creator or inventor had produced a mechanical device and had engaged in negotiations and conversations with the defendants relative to their making and marketing his product with payment of a royalty to him. It was, of course, necessary there for the individual to explain and probably demonstrate the article involved, not with the idea of selling it, however, but with the idea that it would be manufactured by the other party under a contractual relationship, a type of licensing, perhaps. We think those cases are different from the case here, of a salesman

offering for sale something that has long been in use, was well known to the purchaser, and had been widely presented to and advertised to the public. The use of someone else's idea is not automatically a violation of the law. It must be something that meets the requirements of a "trade secret" and has been obtained through a breach of confidence in order to entitle the injured party to damages and/or injunction. The Federal court stated, in G.W. Cole Co. v. American Cement & Oil Co. et al., 7 Cir., 130 F. 703, 708, as follows:

> "The law of unfair trade has never gone to the length of preventing fair competition in trade. The law seeks only to restrain fraudulent practices inducing confusion of goods and deception of the public. There is nothing in the relation of these parties which prohibited such competition. The Excelsior Supply Company was a customer of the appellant, buying largely of its product 'Three in One.' It had special terms from the appellant, as had all its large customers; but that course of business created no trust relation between them, and constitutes no objection to competition."

There is a long line of cases holding that the courts will protect, where one obtains a thing by violation of a trust, or where one, by some other wrongful act, becomes an involuntary trustee. O'Bear-Nester Glass Co. v. Antiexplo Co., 101 Tex. 431, 108 S.W. 967, 16 L.R.A., N.S., 520; Harrison v. Riddell, 64 Mont. 466, 210 P. 460, at page 464; Franke et al v. Wiltscheck, 2 Cir., 209 F. 2d 493; 170 A.L.R. 488. Here, however, as we have stated above, we cannot find that appellant obtained any trade secret from appellees by the breach of any confidential relationship. As we have

heretofore said, the cards and other advertising were self-explanatory and had been widely distributed to and presented to the public. There is no evidence that the appellees' representative, Goulding, asked appellant to treat any of these matters confidentially. As a matter of fact, we do not know what could have been confidential, other than the price paid by appellant, as the entire operation of this promotion had been and was to be carefully explained to the public.

Therefore, because we do not believe there is a trade secret here involved, and because we do not believe that any information that appellant's advertising agency might have used was improperly obtained or obtained through breach of confidence, we must hold that there was not sufficient reason or justification to warrant the trial court in granting the injunction. On the basis of what we have just stated, we do not believe the argument of maintaining status quo has any substantial merit.

Appellant has raised other points, to-wit, that the injunction violates the Texas anti-trust laws; that the cards and the use thereof is against the public policy of the State, and that appellees did not show that they did not have adequate and available remedies of law. We do not find merit in any of these points, and will overrule them without discussion.

For the reasons stated above, the temporary injunction heretofore granted by the trial court is dissolved and dismissed.

APPENDIX C.

Constitutional Provisions.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 15 TEXAS CONSTITUTION

"The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and efficiency. . . ."

Statutory Provisions.

TITLE 28 UNITED STATES CODE, SECTION 1257(3)

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

ARTICLE 2123, VERNON'S TEXAS CIVIL STATUTES

"The right to trial by jury shall remain inviolate, subject to the following rules and regulations."

ARTICLE 4642, VERNON'S TEXAS CIVIL STATUTES

"Judges of the district and county courts shall in term time or vacation hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

(1) Where the applicant is entitled to the relief demanded and such relief or any part thereof require the restraint or some act prejudicial to him . . ."

* * *

(3) Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statute of this State relating to the granting of injunctions . . ."

* * *

APPENDIX D.

Motion for Rehearing.

To the Honorable Court of Civil Appeals:

NOW COME United Specialty Advertising Company and United Specialty Production Company, appellees in this cause, and move the court to grant them a rehearing, and, upon such hearing, set aside the opinion and judgment of the court of November 25, 1964, reversing the judgment of the trial court and rendering judgment that appellees take nothing by their suit, and, upon such hearing, proceed to affirm the judgment of the trial court in all things and matters because:

ASSIGNMENTS OF ERROR

1.

The Court of Civil Appeals erred in holding in this appeal of the cause on the merits that, notwithstanding the full development of the testimony and the verdict of the jury, there was no trade secret in the cause because of the determination of that issue of fact and law by the appellate court in the prior appeal from the temporary injunction order.

2.

The Court of Civil Appeals erred in holding that its prior opinion and decision in the appeal from the temporary injunction order finally settled and determined that appellees' advertising program and system failed to constitute a trade secret, without regard to the full development of the evidence and the successfull trial to the jury in the trial on the merits.

3.

The Court of Civil Appeals erred in holding that the appeal of this cause after a trial on the merits is de-

termined by the prior opinion and decision of the appellate court in the appeal from the temporary injunction order, because:

(1) the issues raised by the pleadings and the controlling testimony introduced in evidence and the facts found by the jury are no longer the same as those before the appellate court in the prior appeal;

(2) new parties were made before the trial on the merits was had and the parties now before the court on this appeal are not the same as those before the court in the appeal from the temporary injunction order; and

(3) the issues only partially developed and found by the trial court in the temporary injunction hearing have now been fully and completely developed and tried and the findings of the jury in favor of appellees support four separate and independent causes of action, to wit, (a) theft of trade secrets, (b) breach of a confidential relationship, (c) unfair competition, and (d) unlawful conspiracy.

4.

The Court of Civil Appeals erred in holding that there was no evidence of a trade secret.

5.

The Court of Civil Appeals erred in holding that there was no evidence to support appellees' claim — and the jury's findings—that appellees' advertising program and system was not a simple and obvious device revealed by the "bonus card" alone, that such device was developed by appellees for continuous use in the operation of their business, that the development of such pro-

gram and device was the product of appellees' expenditure of labor, skill and money, and that such device was unknown to appellants until disclosed to them by appellees.

6.

The Court of Civil Appeals erred in substituting itself as the fact finding body and declaring, contrary to the facts found by the jury and the trial court, that appellees' advertising program and system was a simple and obvious device, revealed by the "bonus card" alone, and not such a program or device as developed by appellees as a product of their expenditure of labor, skill and money to be used in their business, and was not such a development of information and an advertising program as to constitute a trade secret.

7.

The Court of Civil Appeals erred in holding that no confidential relationship could be proved between the parties in the trial of this cause on its merits because that issue of fact and law had been determined against appellees in the prior appeal from the temporary injunction order.

8.

The Court of Civil Appeals erred in holding that its prior opinion and decision in the appeal from the temporary injunction order finally settled and determined the question of both fact and law that there was no confidential relationship existing between appellees and appellants for the breach of which an action would lie.

9.

The Court of Civil Appeals erred in holding that its prior opinion and decision in the appeal from the tem-

porary injunction order conclusively settled and determined, on this appeal from a trial of the cause on its merits, that there was no confidential relationship between the parties because:

(1) The issues raised by the pleadings and the controlling testimony introduced in evidence and the facts found by the jury are no longer the same as those before the appellate court in the prior appeal;

(2) new parties were made before the trial on the merits was had and the parties now before the court on this appeal are not the same as those before the court in the appeal from the temporary injunction order; and

(3) the issues only partially developed and found by the trial court in the temporary injunction hearing have now been fully and completely developed and tried and the findings of the jury in favor of the appellees support four separate and independent causes of action, to wit, (a) theft of trade secrets, (b) breach of a confidential relationship, (c) unfair competition, and (d) unlawful conspiracy.

10.

The Court of Civil Appeals erred in holding that there was no evidence of a confidential relationship between the parties.

11.

The Court of Civil Appeals erred in holding that there was no evidence to support the jury finding that there existed between the parties a relation of trust

and confidence at the time of the transactions had between them in 1959.

12.

The Court of Civil Appeals erred in holding that there was no evidence to support appellees' claims—and the jury's findings—that appellees disclosed its advertising program to appellants for the purpose of enabling appellants to appraise its value, that appellees disclosed the details of its advertising program to appellants as a part of the negotiations leading up to the execution of the sales contract between the parties, that appellants obtained their knowledge of the advertising program and system though their dealing with appellees, that there existed between appellants and appellees a relation of trust and confidence at the time of the transactions had between them.

13.

The Court of Civil Appeals erred in holding that there was nothing about the transactions and dealings of the parties which would establish a confidential relationship, because the evidence established, and the jury found, appellees disclosed their advertising program to appellants for the purpose of enabling appellants to appraise its value, the details of the program were disclosed to appellants as a part of the negotiations leading up to the sales contract between the parties, appellants obtained their knowledge of the details of the program and system through dealing with appellees, the details of the program and device were unknown to appellants until disclosed to them by appellees, and appellees by distributing the bonus cards had not made known to the general public the details of its advertising program.

14.

The Court of Civil Appeals erred in substituting itself as the fact finding body and declaring, contrary to the facts found by the jury and the trial court, that there was no confidential relationship between the parties for the breach of which an action would lie.

15.

The Court of Civil Appeals erred in holding that the judgment of the trial court cannot be supported on the basis of unfair competition.

16.

The Court of Civil Appeals erred in holding that there was no evidence of unfair competition.

17.

The Court of Civil Appeals erred in holding that the necessary elements of a civil conspiracy were not present in this cause, because, a civil conspiracy is defined in law as a combination of two or more persons by concerted action to accomplish an unlawful purpose, and there was evidence to support the jury findings that there was a combination of the defendants who conspired to accomplish the unlawful purpose of engaging in the theft, appropriation and improper use of appellees' advertising program and device.

18.

The Court of Civil Appeals erred in substituting itself as the fact finding body and declaring, contrary to the facts found by the jury and the trial court, that there was no conspiracy and no unfair competition,

because the jury and trial court have found that appellees' advertising program and system was not a simple and obvious device revealed by the "bonus card" alone, that such device consisted of the compilation of information used by appellees in their business and developed by them for continuous use in the operation of their business, that the details of such device were unknown to appellants until disclosed to them by appellees, that such device was developed by appellees on the basis of information obtained, compiled and put in proper form by them as a product of their labor, skill and money, and appellants joined together in an agreement between themselves to develop and use such advertising program substantially the same as that of appellees with the intention to operate their own program for their own profit and to the injury and damage of appellees' business, and that appellants appropriated to themselves appellees' said advertising operations to the profit of appellants and loss to appellees.

19.

The Court of Civil Appeals erred in finding and holding that, as a matter of law, from disputed facts, there was no conspiracy between appellants to take and appropriate appellees' advertising program and device to use same in competition with appellees' advertising operation to the profit of appellants and loss to appellees.

20.

The Court of Civil Appeals erred in overruling appellees' Second Counterpoint, that the jury verdict, and the trial court judgment, established appellees' right of recovery for theft of trade secrets.

21.

The Court of Civil Appeals erred in overruling appellees' Third Counterpoint, that the jury verdict, and the trial court judgment, established appellees' right of recovery for unfair competition.

22.

The Court of Civil Appeals erred in overruling appellees' Fourth Counterpoint, that the jury verdict, and the trial court judgment, established appellees' right of recovery for unlawful conspiracy.

23.

The Court of Civil Appeals erred in overruling appellees' Thirteenth Counterpoint, that the trial court judgment is proper and should be affirmed on the basis of Article 850, et seq., Vernon's Civil Statutes of the State of Texas.

APPENDIX E.

Application for Writ of Error.

In the Supreme Court of Texas.

POINTS OF ERROR.

I.

The Court of Civil Appeals erred in applying the doctrine of "law of the case" to decide and determine this appeal of the cause upon the merits on the Court's findings of fact and pronouncements of law in the prior temporary injunction appeal.

II.

The Court of Civil Appeals erred in giving controlling effect to the doctrine of "law of the case" to determine this appeal of the cause where there are now presented different pleadings, new parties, additional theories and causes of action, and a full development of the evidence.

III.

The Court of Civil Appeals erred in holding that there was no evidence of a trade secret.

IV.

The Court of Civil Appeals erred in holding that there was no evidence of a confidential relationship between the parties.

V.

The Court of Civil Appeals erred in holding that there was no evidence of unfair competition.

VI.

The Court of Civil Appeals erred in holding that there can be actionable unfair competition only where (a) a confidence is violated or (b) there is a palming off of one's goods for that of another.

VII.

The Court of Civil Appeals erred in holding that there was no evidence of the necessary elements of a civil conspiracy.

VIII.

The Court of Civil Appeals erred in holding that there can not be any civil conspiracy where one person who furnishes the product and the other person takes and uses the product, even though they acted together with malice without just cause or excuse to injure the third party.

IX.

The Court of Civil Appeals erred in ignoring and in failing and refusing to apply Articles 850 and 851 in protection of petitioners' bonus card advertising design and device.

APPENDIX F.

Motion for Rehearing of Application for Writ of Error.

To the Honorable Supreme Court of Texas:

Now come United Specialty Advertising Company and United Specialty Production Company, appellees in the Court of Civil Appeals, and petitioners for writ of error, and move this honorable Court to grant them a new hearing and to set aside the judgment rendered herein on March 17, 1965, refusing their Application for Writ of Error, and as grounds for such motion respectfully show the Court the following:

POINTS

I

The error of the Court in approving the holding of the Court of Civil Appeals in applying the doctrine of "law of the case" to decide and determine this appeal of the cause upon the merits on the Court of Civil Appeals' findings of fact and pronouncements of law in the prior appeal from the temporary injunction order.

II

The error of the Court in approving the action of the Court of Civil Appeals in applying the doctrine of "law of the case" as stated by that court in the prior temporary injunction appeal to decide and determine this present appeal of the cause upon the merits, after trial upon the merits with a jury and with jury findings in favor of petitioners.

III

The error of the Court in approving the holding of the Court of Civil Appeals in applying the doctrine of "law of the case" to deny petitioners a trial by jury.

IV

The error of the Court in approving the holding of the Court of Civil Appeals in giving controlling effect to the doctrine of "law of the case" to determine this appeal of the cause from the judgment on the merits where there are now presented different pleadings, new parties, additional theories and causes of action and a full development of the evidence since the prior appeal from the temporary injunction order.

V

The error of the Court in approving the holding of the Court of Civil Appeals that there was no evidence raising jury issues of a trade secret.

VI

The error of the Court in approving the holding of the Court of Civil Appeals that there was no evidence raising jury issues concerning the confidential relationship between the parties.

VII

The error of the Court in approving the holding of the Court of Civil Appeals that there was no evidence raising jury issues of unfair competition.

VIII

The error of the Court in approving the holding of the Court of Civil Appeals that there can be actionable unfair competition only where (a) a confidence is violated or (b) there is a palming off of one's goods for that of another.

IX

The error of the Court in approving the holding of the Court of Civil Appeals that there was no evidence raising jury issues concerning a civil conspiracy.

X

The error of the Court in approving the holding of the Court of Civil Appeals that there was no evidence of the necessary elements of a civil conspiracy.

XI

The error of the Court in approving the holding of the Court of Civil Appeals that there can not be any civil conspiracy where one person furnishes the product and the other person takes and uses the product, even though they acted together with malice without just cause or excuse to injure the third party.

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No. 239

In the

Supreme Court of the United States

OCTOBER TERM, 1965

On Petition for Writ of Certiorari to the Texas Court of Civil Appeals at El Paso

UNITED SPECIALTY ADVERTISING COMPANY AND UNITED SPECIALTY PRODUCTION COMPANY,

Petitioners,

v.

FURR'S, INC., REX WEBSTER, LEON E. HARRIS AND HOWARD WELBORN, individually and dba WEBSTER, HARRIS & WELBORN ADVERTISING AGENCY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Argument and Authorities	
Petitioners' Contention that Petitioners were Denied a Trial by Jury	6
Decision and Holding of the Court of Civil Appeals That There Was No Evidence to Support Recovery for Plaintiffs on Any Theory	8
Conclusion	12
Certificate	12

Index to Appendixes

	Page
Appendix A — 14th Amendment to United States Constitution, Section 1	A- 1
Appendix B — Texas Constitution, Article 1, Section 15	A- 2
Appendix C — Vernon's Texas Civil Statutes, Article 2123	A- 3
Appendix D — Texas Rules of Civil Procedure, Rule 166-A (a) (c)	A- 4
Appendix E — Texas Rules of Civil Procedure, Rule 301	A- 5
Appendix F — Federal Rules of Civil Procedure, Rule 56 (a) (c)	A- 6
Appendix G — Federal Rules of Civil Procedure, Rule 50	A- 7
Appendix H — Federal Rules of Civil Procedure, Rule 8 (a)	A-10
Appendix I — Texas Rules of Civil Procedure, Rule 45	A-11
Appendix J — Texas Rules of Civil Procedure, Rule 47	A-12

Page

Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 11 L. Ed. 2d 669 (March 9, 1964) 11

Cox v. City of Freeman, Missouri, 321 F. 2d 887, 891 (2) (8th Cir., 1963) 9

Fidelity and Deposit Company of Maryland v. United States, 187 U.S. 315, 47 L. Ed. 194 (1902) 9

Galloway v. United States, 319 U.S. 372, 87 L. Ed. 1458 (1942) 9

In Re: Higginbotham's Estate, 192 S.W. 2d 285 (7) (Tex. Civ. App. 1946, no writ hist.) 9

Manaia v. Potomac Electric Power Company, 268 F. 2d 793, 798-799 (4th Cir., 1959), certiorari denied, 361 U.S. 913, 4 L. Ed. 2d 183 9

Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F. 2d 871, 877 (6th Cir., 1943), certiorari denied, 320 U.S. 800, 88 L. Ed. 483, rehearing denied, 321 U.S. 803, 88 L. Ed. 1089 9

Schroeder v. Texas & Pacific Ry. Co., 243 S.W. 2d 261, 263 (Tex. Civ. App. 1951, no writ hist.) 9

Sears, Roebuck & Company v. Stiffel Company, 376 U.S. 225, 11 L. Ed. 2d 661 (March 9, 1964) 11

Swinford v. Logue, 313 S.W. 2d 547, 549 (1) (Tex. Civ. App. 1958, mandamus overruled) 8

Welch v. Welch, 369 S.W. 2d 434, 436 (1) (Tex. Civ. App. 1963, no writ hist. to date) 8

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No. 239

In the

Supreme Court of the United States

OCTOBER TERM, 1965

On Petition for Writ of Certiorari to the Texas Court of Civil Appeals at El Paso

UNITED SPECIALTY ADVERTISING COMPANY AND UNITED SPECIALTY PRODUCTION COMPANY,

Petitioners,

v.

FURR'S, INC., REX WEBSTER, LEON E. HARRIS AND HOWARD WELBORN, individually and dba WEBSTER, HARRIS & WELBORN ADVERTISING AGENCY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

To The Honorable Supreme Court of the United States:

Furr's, Inc., et al, Respondents, submit this Reply to Petitioners' Writ of Certiorari to the Texas Court of Civil Appeals at El Paso, and would respectfully show the following:

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals at El Paso that is here attached is reported in 385 S.W. 2d, commencing at page 456 (November 25, 1964, error ref. n.r.e.).

A previous decision of the Texas Court of Civil Appeals at El Paso on an appeal from a temporary injunction is reported in 338 S.W. 2d, commencing at page 762 (Tex. Civ. App. 1960, error ref. n.r.e.).

JURISDICTION

Petitioners seek to invoke jurisdiction under *Title 28, U.S.C.*, Section 1257(3), under the theory that Petitioners were denied a jury trial and thereby denied equal protection of the laws under *Section 1* of the *Fourteenth Amendment* to the *United States Constitution.*

We respectfully submit that there is no basis for jurisdiction or review of the decision of the Texas Court of Civil Appeals and that Petitioners were, in no matter, denied a jury trial nor denied equal protection of the laws. This will hereafter be fully discussed in detail.

QUESTION PRESENTED FOR REVIEW

Petitioners state that the question is whether the denial of a jury trial because of an unsuccessful attempt to secure a temporary injunction at an earlier stage in the proceedings deprives a litigant of equal protection of the laws.

We would merely point out here (as will be fully discussed below) that the factual basis upon which Petitioners' "question" and brief is predicated is incorrect. Petitioners were not denied a jury trial at all and were not denied a jury trial because of an unsuccessful attempt to secure a temporary injunction previously. The Texas Court of Civil Appeals merely reversed and rendered judgment for Respond-

ents in this case because, inter alia, there was no evidence to support a verdict or judgment for plaintiffs and defendants were entitled to judgment as a matter of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions involved or material to this appeal are copied verbatim in the Appendix and are as follows:

(1) Appendix A — 14th Amendment to United States Constitution, Section 1;

(2) Appendix B — Article 1, Section 15, Texas Constitution (relating to right to trial by jury);

(3) Appendix C — Article 2123, Vernon's Texas Civil Statutes (relating to trial by jury);

(4) Appendix D — Rule 166-A, Texas Rules of Civil Procedure, Subdivisions (a) and (c) (summary judgment);

(5) Appendix E — Rule 301, Texas Rules of Civil Procedure (rule relating to judgment non obstante veredicto);

(6) Appendix F — Rule 56(a) and (c), Federal Rules of Civil Procedure (summary judgment);

(7) Appendix G — Rule 50, Federal Rules of Civil Procedure (relating to directed verdict and judgment n.o.v.);

(8) Appendix H — Rule 8(a), Federal Rules of Civil Procedure (general rules of pleading);

(9) Appendix I — Rule 45, Texas Rules of Civil Procedure (rule relating to pleading);

(10) Appendix J — Rule 47, Texas Rules of Civil Procedure (rule relating to pleading).

STATEMENT OF THE CASE

In February, 1960, United Specialty Advertising Company, et al, filed suit against Furr's, Inc., alleging that it was engaged in the sale of an advertising specialty known as "bonus cards," which it had developed; that in September, 1959, the defendant entered into a contract to purchase certain quantities of these cards from plaintiffs and in connection with the sale plaintiffs also furnished bag stuffers, etc. Plaintiffs alleged that in January, 1960, defendant distributed its own cash circle bonus cards; that defendant's cards were an unlawful imitation of the cards of plaintiffs, which involved piracy, breach of confidential relationship, appropriation, conversion, breach of fiduciary relationship, utilizing plaintiffs' trade secrets, infringing plaintiffs' rights, etc. Plaintiffs sought a temporary writ of injunction restraining and enjoining defendant and its agents, servants, representatives from using or in any manner infringing upon plaintiffs' advertising scheme, and prayed that such injunction be made permanent and that plaintiffs have judgment for damages in the amount of $750,000 and for such other relief as they may be entitled. After a lengthy hearing and presentation of evidence, the trial court granted plaintiffs a temporary injunction, from which defendants appealed. In 388 S.W. 2d 762, the Texas Court of Civil Appeals dissolved and dismissed the temporary injunction. Plaintiffs' application for writ of error was refused by the Texas Supreme Court, "no reversible error." The Court of Civil Appeals held in 338 S.W. 2d 762 that as a matter of law

plaintiffs had no legally protectable right. The Court of Civil Appeals held that the bonus cards did not constitute a trade secret and that, furthermore, any information obtained by defendants in connection therewith was not obtained through breach of confidence or confidential relationship and that no unfair trade or competition was involved.

Before the jury trial on the merits, plaintiffs amended their petition and included as defendants the members of the advertising agency which prepared the card for Furr's, Inc. Just as in the original petition, plaintiff's entire cause of action was based upon an alleged wrongful appropriation or copying by defendants of plaintiffs' "bonus card" advertising device, and plaintiffs again sought a permanent injunction restraining defendants from utilizing in any way plaintiffs' advertising scheme and for monetary damages (Tr. 3). The trial court awarded plaintiffs judgment for $60,000 and a permanent injunction based upon a jury verdict.

Defendants appealed, inter alia, on the ground that the trial court erred in refusing to grant defendants' motion for instructed verdict, and motion for judgment n.o.v., defendants being entitled to judgment as a matter of law, and there being no evidence to support the jury's answers to certain issues.

The Texas Court of Civil Appeals, in 385 S.W. 2d 456, reversed the judgment of the trial court, dissolving the

injunction and rendered judgment that plaintiffs take nothing. In essence, the Court of Civil Appeals held:

(1) The "law of the case" precluded recovery on the theory of trade secret or confidential relationship, since there was no material difference in the evidence material to these theories presented in the injunction hearing and in the trial on the merits.

(2) That under the evidence presented in this case plaintiff was precluded from recovery as a matter of law in that:

(a) There was no evidence to establish a confidential relationship between the parties and thus no basis for judgment on confidential relation or appropriation of trade secret;

(b) No evidence of unfair competition because no confidence was violated and there was no "palming off" of one goods for those of another;

(c) No proof of elements of civil conspiracy.

ARGUMENT AND AUTHORITIES

Petitioners' Contention that Petitioners Were Denied a Trial by Jury

Petitioners quote the following sentence from the Court of Civil Appeals: "The evidence is more voluminous, but its quality is unchanged." This sentence was contained in the discussion by the Court on the question of the "law of the case" as it related to Petitioners' theories of trade secret and confidential relationship. Petitioners conclude from this sentence and attempts to persuade this Court that the Texas Court of Civil Appeals substituted its own find-

ing of fact for that of the jury and that even though the Court of Civil Appeals discussed in detail and specifically held that there is no evidence to support judgment for plaintiffs on any theory, that the subsequent discussion by the Court is merely "obiter dictum" and "purported grounds" of the Court's decision (Petition for Certiorari, pages 6, 7, 12).

Petitioners also contend that the case in the trial on the merits was entirely different than that on the hearing for temporary injunction.

Under the Texas Rules, as under the Federal Rules, relating to pleadings, the purpose and requirement of the petition is to give the defendants notice of the claim asserted by plaintiffs and the relief sought (Appendixes H, I, J). The theories of recovery are immaterial. An examination of the pleadings clearly reveals that the case was the same. Plaintiffs originally sought damages and an injunction against defendant from the use of its cash circle card because plaintiffs claimed such use to be an infringement upon their exclusive right. The transactions and facts upon which plaintiffs based their claim and the relief sought were the same in the trial on the merits.

In the appeal on the temporary injunction the Court of Civil Appeals held as a matter of law that no trade secret or confidential relationship existed. In this appeal, the Court of Civil Appeals held that the granting or refusal of a temporary injunction is not res judicata, but may become the "law of the case" as to the legal principles declared

and held that the application of the "law of the case" depends in each case on what was done. The facts reflected by the jury findings in the trial on the merits and the evidence in the temporary injunction hearing were identical (338 S.W. 2d 762, at page 765; Tr. 73, 74). In effect, the Court of Civil Appeals held that the trial court erred in refusing to grant Defendants' Motion for Instructed Verdict or Motion for Judgment N.O.V., since the controlling evidence presented in the trial on the merits was the same as that presented in the hearing for temporary injunction. Since the controlling facts were unchanged, the law applied to such facts would not be subject to change. In fact, to sustain a temporary injunction, plaintiffs had a lesser burden than in a trial on the merits. To sustain temporary injunction, plaintiffs need only show a "probable right." If the evidence did not sustain a temporary injunction on the theory of trade secret or confidential relationship as a matter of law, certainly the same evidence could not sustain a judgment for plaintiffs on such theories on the merits. A holding contrary to that of the Court of Civil Appeals would not only be contrary to the law but would defy logic.

Decision and Holding of the Court of Civil Appeals That There Was No Evidence to Support Recovery for Plaintiffs on Any Theory

The right to trial by jury refers to the right as it existed at common law. *Welch v. Welch*, 369 S.W. 2d 434, 436 (1) (Tex. Civ. App. 1963, no writ history to date); *Swinford v. Logue*, 313 S.W. 2d 547, 549 (1) (Tex. Civ. App. 1958,

mandamus overruled). It is, of course, fundamental that the jury may only pass upon questions of fact and it is for the trial judge and appellate courts to determine questions of law: e.g., *In Re: Higginbotham's Estate*, 192 S.W. 2d 285 (7) (Tex. Civ. App. 1946, no writ hist.).

The Texas Rules of Civil Procedure, as well as the Federal Rules, provide for the granting of summary judgment, directed verdict or judgment n.o.v. when no material fact issue exists, and one party is entitled to judgment as a matter of law (Appendixes D, E, F, G). It is well settled that such rules are constitutional and in no manner deprive plaintiff of a right to jury trial or any other constitutional right. *Galloway v. United States*, 319 U.S. 372, 87 L. Ed. 1458 (1942); *Cox v. City of Freeman*, Missouri, 321 F. 2d 887, 891 (2) (8th Cir., 1963); *Manaia v. Potomac Electric Power Company*, 268 F. 2d 793, 798-799 (4th Cir., 1959), certiorari denied, 361 U.S. 913, 4 L. Ed. 2d 183; *Schroeder v. Texas & Pacific Ry. Co.*, 243 S.W. 2d 261, 263 (Tex. Civ. App. 1951, no writ hist.); *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F. 2d 871, 877 (6th Cir., 1943), certiorari denied, 320 U.S. 800, 88 L. Ed. 483, rehearing denied, 321 U.S. 803, 88 L. Ed. 1089; *Fidelity and Deposit Company of Maryland v. United States*, 187 U.S. 315, 47 L. Ed. 194 (1902).

In *Manaia v. Potomac Electric Power Company*, 268 F. 2d 793 (4th Cir., 1959), supra, on pages 798-799, the Court said:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the

> Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences."

The Texas Court of Civil Appeals in this case fully discussed the testimony and evidence in this case and correctly concluded there was no fact issue and that there was no evidence to support the judgment under any theory and that the trial court erred in not granting Defendants' Motion for Instructed Verdict or Judgment N.O.V. Thus, regardless of the correctness of the Court's holding that under the "law of the case" there was no trade secret or confidential relationship, the Court of Civil Appeals' judgment is fully supported by its holding that under the testimony presented there was no evidence to support recovery for plaintiffs under any theory and no fact issue in the case.

Petitioners do not even attempt to justify their statement that such holding was a "purported" ground of decision. In fact, the Court of Civil Appeals devoted a

much greater portion of its opinion and discussion of the testimony to its holding of "no evidence" than it did to its holding with regard to "the law of the case."

This Court had similar cases before it on the merits in *Sears, Roebuck & Company v. Stiffel Company*, 376 U.S. 225, 11 L. Ed. 2d 661 (March 9, 1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 11 L. Ed. 2d 669 (March 9, 1964). In fact, these cases were much stronger from the plaintiff's standpoint than the case at bar. Under these cases, if the Texas Court of Civil Appeals in this case had reached a contrary decision, it would have been invalid under *Article I, Section 8, Clause 8* of the *United States Constitution*. This Honorable Court, in the Compco case held:

> "* * * Today we have held in Sears, Roebuck & Co. v. Stiffel Co., supra, that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I § 8, Cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal patent (376 U.S. 238) laws it is, therefore, in the public domain and can be copied in every detail by whoever pleases. It is true that the trial court found that the configuration of Day-Brite's fixture identified Day-Brite to the trade because the arrangement of the ribbing had, like a trademark, acquired a 'secondary meaning' by which that particular design was associated with Day-Brite. But if the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will."

CONCLUSION

Wherefore, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

Copy of the foregoing was deposited in the United States mail at Midland, Texas in a properly stamped envelope for air mail delivery addressed to Petitioners' counsel, viz.: Maurice J. Hindin, Esq., at his post office address, 400 South Beverly Drive, Beverly Hills, California, and in a properly stamped envelope addressed to Petitioners' counsel, W. B. Browder, Jr., Esq., at his post office address, Midland Savings Building, Midland, Texas, this the 4 day of July, 1965. THIS I CERTIFY.

WILLIAM L. KERR,
111 Midland Tower Bldg.,
Midland, Texas.

APPENDIX A

14th Amendment to United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Texas Constitution

Article 1, Section 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury. As amended Aug. 24, 1935.

APPENDIX C

Vernon's Texas Civil Statutes

Article 2123. The right to trial by jury shall remain inviolate, subject to the following rules and regulations. (Constitution, Art. 1, Sec. 15)

APPENDIX D

Texas Rules of Civil Procedure

Rule 166-A. (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

APPENDIX E

Texas Rules of Civil Procedure

Rule 301. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

APPENDIX F

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX G

Federal Rules of Civil Procedure

Rule 50. Motion for a Directed Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new

trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve

a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. As amended Jan. 21, 1963, eff. July 1, 1963.

APPENDIX H

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

APPENDIX I

Texas Rules of Civil Procedure

Rule 45. Definition and System

Pleadings in the district and county court shall

(a) Be by petition and answer.

(b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.

(c) Contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

(d) Be in writing, signed by the party or his attorney, and be filed with the clerk.

All pleadings shall be so construed as to do substantial justice.

APPENDIX J

Texas Rules of Civil Procedure

Rule 47. Claims for Relief

A pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved, and

(b) a demand for judgment for the relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded.